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No. 95-5841

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MICHAEL A. WHREN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS M. GANNON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

14pp

QUESTION PRESENTED

Whether the stop of petitioners' vehicle after police officers observed the driver commit traffic violations violated the Fourth Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 53 F.3d 371.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1995. A petition for rehearing was denied on July 13, 1995. Pet. App. A7. The petition for a writ of certiorari was filed on August 31, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioners were convicted of possessing

crack cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1); possessing crack cocaine with the intent to distribute it within 1,000 feet of a school, in violation of 21 U.S.C. 860(a); possessing marijuana, in violation of 21 U.S.C. 844(a); and possessing phencyclidine ("PCP"), in violation of 21 U.S.C. 844(a). The district court sentenced each petitioner to a total of 168 months' imprisonment, to be followed by a ten-year period of supervised release. Whren was also fined $8,800. The court of appeals affirmed petitioners' convictions, but remanded for resentencing. Pet. App. A1-A7.

1. On the evening of June 10, 1993, several District of Columbia plainclothes police officers were patrolling for drug activity in southeast Washington, driving unmarked cars. Pet. App. A2. As the officers made a left turn, Officer Soto noticed a Nissan Pathfinder with temporary tags stopped at the intersection, and he saw the driver, later identified as petitioner Brown, looking down into the lap of the passenger, petitioner Whren. Soto observed that the Pathfinder remained stopped at the intersection for more than 20 seconds, obstructing at least one car that was stopped behind it. The officers made a U-turn to follow the Pathfinder. As they did so, petitioners turned without signalling and "sped off quickly" at an "unreasonable speed." Ibid.

The officers followed the Pathfinder until it stopped at another intersection, where it was largely boxed in by other cars in front of and behind it and to its right. Pet. App. A2. The officers pulled up next to the Pathfinder on the driver's side.

Officer Soto then approached the driver's side of the Pathfinder, identified himself as a police officer, and told petitioner Brown to put the Pathfinder in park. As Soto was speaking, he saw that Whren was holding two large clear plastic bags of what appeared to be crack cocaine. Soto yelled "C.S.A." to alert the other officers that he had observed a Controlled Substances Act violation. As Soto reached for the driver's side door, petitioner Whren yelled "Pull off, pull off," pulled the cover from a power window control panel in the passenger door, and put one of the large bags into a hidden compartment there. Soto opened the Pathfinder's door, dove across Brown, and grabbed the other bag from Whren's hand. Another officer pinned Brown to the back of the driver's seat. After arresting petitioners, the officers searched the Pathfinder and recovered two tinfoils containing marijuana laced with PCP, a bag of chunky white rocks, and a large white rock of crack cocaine from the hidden compartment in the car door, as well as numerous unused ziplock bags, a portable phone, and personal papers. Pet. App. A2-A3.

2. Petitioners moved to suppress the evidence obtained from their car. Pet. App. A3. At the suppression hearing, Officer Soto testified that he had stopped the Pathfinder because the driver was "not paying full time and attention to his driving." Soto said that he had not intended to give the driver a ticket, but that he had wished to ask why the driver was obstructing traffic and why he had sped off, without signalling, in a school area. Soto testified that the decision to stop the Pathfinder was not based on peti-

tioners' "racial profile," but on the driver's actions. The second officer's testimony essentially confirmed Soto's account. Petitioners argued that the officers' stated reasons for the stop were pretextual, and that the stop violated the Fourth Amendment because it was made without legally sufficient cause. Ibid.

The district court denied petitioners' motions to suppress. See Pet. App. A3. Although the court noted some minor discrepancies between the testimony of the two arresting officers, it explained that "the facts of the stop were not controverted," and that "[t]here was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop." Accepting Soto's testimony, the court concluded that "the government has demonstrated through the evidence presented that the police conduct was appropriate and, therefore, there is no basis to suppress the evidence." Ibid.

3. The court of appeals affirmed. Pet. App. A1-A6. The court rejected petitioners' argument that a stop to investigate routine traffic violations is constitutionally permissible only if a reasonable police officer would have made the same stop in the absence of any other, constitutionally invalid purpose. Id. at A4-A5. Instead, the court explicitly adopted the rule followed by a majority of other courts of appeals that "regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances could have stopped the car for the suspected

traffic violation." Id. at A5. The court reasoned (id. at A5-A6) that the "could have" test provides "a more principled method of determining reasonableness" than the "would have" test, because it eliminates any need for a court to inquire into an officer's subjective state of mind, ibid., while at the same time it "provides a principled limitation on abuse of power" by requiring that a stop be supported by "probable cause to believe a traffic violation has occurred or a reasonable suspicion of unlawful conduct based upon articulable facts" (id. at A6).

Applying that standard to the facts of this case, the court of appeals concluded (Pet. App. A6) that Brown's failure to give "full time and attention" to his driving, his turning without signalling, and his driving away at an unreasonable speed provided the police with "the articulable and specific facts necessary to establish probable cause to stop" petitioners. The court made clear that it was irrelevant that the officers involved were vice officers who were patrolling for drug offenses, rather than traffic police, because "whether a stop can be made depends on whether the officers had an objective legal basis for it, not on whether the police department assigned the officer in question the duty of making the stop." Ibid.[1]

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[1] The parties agreed below that 21 U.S.C. 841(a)(1), which proscribes possession with intent to distribute controlled substances, describes a lesser offense included within 21 U.S.C. 860(a), which prohibits the same act within 1,000 feet of a school. The court accordingly remanded the case for entry of an amended judgment vacating petitioners' convictions under Section 841(a)(1), and for resentencing on the remaining counts. Pet. App. A6.

ARGUMENT

Petitioners concede (Pet. 7) that a "pretextual" traffic stop is constitutionally permissible so long as it is "objectively justified." They urge this Court to grant review because the courts of appeals have adopted different tests for analyzing when such objective justification exists. Pet. 7-17. The Court has recently denied certiorari, however, in several cases seeking to raise the same issue. See United States v. Ferguson, 8 F.3d 385 (6th Cir. 1993) (en banc), cert. denied, 115 S. Ct. 97 (1994); United States v. Hassan El, 5 F.3d 726 (4th Cir. 1993), cert. denied, 114 S. Ct. 1374 (1994); see also United States v. Sanchez, 38 F.3d 569 (5th Cir. 1994), cert. denied, 115 S. Ct. 1432 (1995); United States v. Cervantes, 19 F.3d 1151 (7th Cir. 1994), cert. denied, 115 S. Ct. 743 (1995); United States v. White, 26 F.3d 1121 (11th Cir.) (Table), cert. denied, 115 S. Ct. 672 (1994).[2] There is no reason for a different disposition here.

The validity of a traffic stop does not turn on the motives of the police officer who makes the stop. This Court has made clear that the validity of searches and seizures under the Fourth Amend-

[2] The Court in recent years has denied review in at least six other cases presenting the question whether a traffic stop based on objectively valid circumstances may be invalidated on the theory that the stop was actually a pretext to investigate other violations of law. See United States v. Cervantes, 947 F.2d 937 (3d Cir. 1991) (Table), cert. denied, 503 U.S. 942 (1992); United States v. Perez, 936 F.2d 574 (6th Cir.) (Table), cert. denied, 502 U.S. 1006 (1991); United States v. Enriquez-Nevarez, 931 F.2d 890 (5th Cir.) (Table), cert. denied, 502 U.S. 962 (1991); United States v. Trigg, 925 F.2d 1064 (7th Cir.), cert. denied, 502 U.S. 962 (1991); United States v. Cummins, 920 F.2d 498 (8th Cir. 1990), cert. denied, 502 U.S. 962 (1991); United States v. Hope, 906 F.2d 254 (7th Cir. 1990), cert. denied, 499 U.S. 983 (1991).

ment must be determined under "a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." Scott v. United States, 436 U.S. 128, 138 (1978). That test has been applied in a variety of Fourth Amendment contexts. See, e.g., Florida v. Jimeno, 500 U.S. 248, 250-252 (1991) (scope of consent); Horton v. California, 496 U.S. 128, 138 (1990) (scope of "plain view" doctrine); Graham v. Connor, 490 U.S. 386, 397-399 (1989) (reasonableness of force used to effect arrest); Maryland v. Macon, 472 U.S. 463, 470-471 (1985) (existence of seizure); United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983) (authority to board vessel for document inspection when other motives may have been present). As the Court explained in Horton v. California, 496 U.S. at 138, "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."

When law enforcement officers observe a traffic offense, the Fourth Amendment permits them to stop the vehicle involved. See Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) (per curiam). Accordingly, most of the courts of appeals have held that if officers have probable cause to stop a vehicle for a traffic offense, the resulting stop will satisfy the Fourth Amendment, regardless of the officers' subjective motivations. See, e.g., United States v. Johnson, 63 F.3d 242, 245-247 (3d Cir. 1995), petition for cert. pending, No. 95-6724; United States v. Jeffus, 22 F.3d 554, 556-557 (4th Cir. 1994); United States v. Scopo, 19

F.3d 777, 782-784 (2d Cir). cert. denied, 115 S. Ct. 207 (1994); United States v. Ferguson, 8 F.3d 385, 391 (6th Cir. 1993) (en banc), cert. denied, 115 S. Ct. 97 (1994); United States v. Meyers, 990 F.2d 1083, 1085 (8th Cir. 1993); United States v. Mitchell, 951 F.2d 1291, 1295 (D.C. Cir. 1991), cert. denied, 504 U.S. 924 (1992); United States v. Trigg, 925 F.2d 1064, 1065 (7th Cir.), cert. denied, 502 U.S. 962 (1991); United States v. Causey, 834 F.2d 1179, 1185 (5th Cir. 1987) (en banc).

The Ninth, Tenth, and Eleventh Circuits have taken a different approach to the pretext issue. Those courts have held that "'in determining when an investigatory stop is unreasonably pretextual, the proper inquiry * * * is not whether the officer could validly have made the stop[,] but whether under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose.'" United States v. Valdez, 931 F.2d 1448, 1450 (11th Cir. 1991) (quoting United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986)); see United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988) (also quoting Smith); United States v. Cannon, 29 F.3d 472, 474-476 (9th Cir. 1994).[3] Recently, however, the Tenth Circuit, on its own initiative, heard en banc argument to consider whether it should overrule Guzman. United States v. Botero-Ospina, Nc. 94-4006 (argued Sept. 9, 1994; reargued en banc Sept. 27,

[3] Earlier Ninth Circuit decisions applied a subjective test based on the "motivation" or "primary purpose" of the officer who makes the stop. Some recent decisions of the same court have noted the inconsistency between those decisions and Cannon, without purporting to resolve it. See United States v. Perez, 37 F.3d 510, 513 (1994); United States v. Millan, 36 F.3d 886, 888-889 (1994); see also United States v. Hernandez, 55 F.3d 443, 445 n.2 (1995).

1995); see also United States v. Fernandez, 18 F.3d 374, 888-890 (10th Cir. 1994) (Brown, J., dissenting) (suggesting reconsideration of Guzman). Thus, it is possible that the conflict among the courts of appeals will lessen in the near future.

In any event, that conflict does not warrant review in this case. Under the minority analysis, a defendant must prove that a reasonable officer would not have made the stop in question based solely on observation of the particular traffic offense. United States v. Maestas, 2 F.3d 1485, 1489 (10th Cir. 1993). Routine police practice ordinarily includes stopping vehicles that commit traffic offenses in the presence of officers, and defendants cannot usually show otherwise. Thus, there are likely to be few traffic stop cases decided differently depending upon the circuit in which they are litigated. Indeed, to date, pretext claims have rarely succeeded in any circuit.[4] Far more typical are cases finding that the stop was undertaken pursuant to routine police practice.[5]

[4] We are aware of only a handful of such claims that have been accepted. See United States v. Hernandez, 55 F.3d at 445-447; United States v. Millan, 36 F.3d at 889-890; United States v. Lyons, 7 F.3d 973, 976 (10th Cir. 1993); United States v. Morales-Zamora, 974 F.2d 149, 153 (10th Cir. 1992); United States v. Valdez, 931 F.2d at 1451.

[5] See, e.g., United States v. Dirden, 38 F.3d 1131, 1139-1140 (10th Cir. 1994); United States v. Perez, 37 F.3d at 512-513; United States v. Cannon, 29 F.3d at 474-476; United States v. Greenspan, 26 F.3d 1001, 1005 (10th Cir. 1994); United States v. Betancur, 24 F.3d 73, 77-78 (10th Cir. 1994); United States v. Sanchez-Valderuten, 11 F.3d 985, 988-989 (10th Cir. 1993); United States v. Maestas, 2 F.3d 1485, 1489 (10th Cir. 1993); United States v. Harris, 995 F.2d 1004, 1005-1006 (10th Cir. 1993); United States v. Martinez, 983 F.2d 968, 972 (10th Cir. 1992), cert. denied, 113 S. Ct. 2372 (1993); United States v. Harris, 928 F.2d 1113, 1116 (11th Cir. 1991); United States v. Pollock, 926 F.2d 1044, 1047 (11th Cir.), cert. denied 502 U.S. 985 (1991); United

Moreover, petitioners have not demonstrated that this case would be found to be pretextual under the law of any circuit. There is nothing in the record to indicate that a reasonable police officer would have taken no action after seeing petitioners' car stop for an unusually long time at a stop sign, turn abruptly without signalling, and drive off at an "unreasonable speed." Pet. App. A2. A common-sense approach to poliçe practice suggests that a reasonable officer would have stopped the car, at least to seek an explanation for the driver's actions. Given petitioners' failure to offer any evidence to the contrary, it is unlikely that their pretext claim would have fared any better in any other circuit. Compare United States v. Horn, 970 F.2d 728, 731 (10th Cir. 1992) (upholding stop for seat belt and license plate violations).

Finally, petitioners err when they argue (Pet. 15-17) that the stop of their vehicle was objectively unreasonable because the police officers allegedly acted in violation of a general order of the District of Columbia's Metropolitan Police Department.[6] First, we note that petitioners waived that claim by failing to

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States v. Neu, 879 F.2d 805, 808 (10th Cir. 1989); United States v. Erwin, 875 F.2d 268, 272 (10th Cir. 1989).

[6] General Order 303.1(A)(2)(a) provides:

> Only on-duty uniformed members driving marked departmental vehicles or members of the Public Vehicle Enforcement Unit, Traffic Enforcement Branch, shall take enforcement action; except in the case of a violation that is so grave as to pose an immediate threat to the safety of others, in which case members who are off duty, not in uniform, or in unmarked cruisers, may take appropriate enforcement action.

raise it before trial. See Gov't C.A. Br. 22-23 n.12; Fed. R. Crim. P. 12(b)(3) (motions to suppress evidence must be made before trial). In any event, as the court of appeals held, the constitutional validity of a traffic stop should not be "subject to the vagaries of police departments' policies and procedures." Pet. App. A6 (quoting United States v. Ferguson, 8 F.3d at 392); see also Johnson, 63 F.3d at 247; Scopo, 19 F.3d at 784. That court thus correctly concluded (Pet. App. A6) that it was constitutionally irrelevant that the officers who stopped petitioners "were vice officers patrolling for drug violations rather than traffic police."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS M. GANNON
Attorney

NOVEMBER 1995

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

WHREN, MICHAEL A. AND JAMES L. BROWN Petitioner	)	
vs.	)	No. 95-5841
USA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 1st day of December 1995.

G. ALLEN DALE
DALE & MITCHELL
307 G STREET, N.W.
WASHINGTON, DC 20001

LISA B. WRIGHT
ASSISTANT FEDERAL PUBLIC DEFENDER
625 INDIANA AVENUE, N.W., SUITE 550
WASHINGTON, DC 20004

Drew S. Days, III/as

DREW S. DAYS, III
Solicitor General

December 1, 1995